Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1561

MICHAEL RICHARD O'CONNER, Et Al. - Petitioners

versus

CITY OF LOUISVILLE FIRE FIGHTERS PENSION FUND - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

TEDDY B. GORDON and
DAVID S. WEINSTEIN
Counsel for Petitioners
Suite 204, Interchange Building
835 West Jefferson Street
Louisville, Kentucky 40202

TEDDY B. GORDON
Counsel of Record
Suite 204, Interchange Building
835 West Jefferson Street
Louisville, Kentucky 40202

WESTERFIELD-SONTE CO., 618 W. KENTUCKY—P.O. BOX 3331, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No._____

MICHAEL RICHARD O'CONNER, ET AL. - *Petitioners*

v.

CITY OF LOUISVILLE FIRE FIGHTERS PENSION FUND - - - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

JURISDICTION

The nature of this proceeding is to deny the validity of Chapter 137. § 137.13 of the codified general ordinance of the City of Louisville (as amended), (*infra*, p. 15) as repugnant to the rights, privileges, and immunities guaranteed by the Equal Protection and Due Process clauses of the Fourteenth Amendment to the constitution of the United States.

The judgment sought to be reviewed is that of the Supreme Court of Kentucky in *City of Louisville Fire Fighters Pension Fund* v. *O'Conner*, ___ S. W. 2d ___. (Appendix *infra*, p. 20), entered January 31, 1978. The judgment of the trial court is not officially reported. (Appendix, *infra*, p. 19). Notice of appeal was filed

contemporaneously with this petition in the Supreme Court of Kentucky.

The jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. § 1257(3) and rule 19(1)(a) of the Supreme Court of the United States Revised Rules.

Jurisdiction is further supported by *Walker* v. *City of Houston,* S.D., Tex., 341 F. Supp. 1124 (1972), a case challenging the constitutionality of statutes creating and controlling police and fire pension funds, wherein the Court held that the merits of this constitutional issue—ownership of mandatory pension fund contributions—though often argued, are not so well settled as to cause the issue to be insubstantial.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is reported at —— S. W. 2d ——, and is printed in the Appendix hereto, *infra*, page 20. The judgment of the Jefferson Circuit Court is printed in the Appendix hereto, *infra*, page 19.

QUESTIONS PRESENTED

1. Is it a denial of due process of law for a government sponsored pension fund to take mandatory contributions, made as a condition of employment, after voluntary termination of that employment by the employee?

2. Is it a denial of equal protection of the laws to grant refunds of mandatory contributions to a government sponsored pension fund in certain cities, and to effectively deny such refunds in larger cities within the same state?

STATEMENT OF THE CASE

Petitioners are three former employees of the City of Louisville Fire Department. Chapter 137 of the Codified General Ordinances of the City of Louisville (as amended, *supra*) requires that each member of the Division of Fire of the City of Louisville (hereafter referred to as "Fire Department") shall be assessed seven percent of his total earnings from the fire department and that such assessment shall be paid to the City of Louisville Fire Fighters Pension Fund (hereafter, "the Fund"). Petitioner O'Conner had taken $2,182.34 while employed by the Fire Department for 56 months. Petitioner Peavler had taken $2,024.20 during about 46 months tenure; Petitioner Shutts paid $2,255.36 into the fund during a four year period of employment.

After resigning from the Fire Department for personal, non-coercive reasons, Petitioners individually demanded a refund of monies assessed by the Fund. The Fund, through its Board of Trustees, denied any responsibility to return the mandatory withholdings, relying on § 137.13 (*supra*, p. 16).

On October 3, 1975, Petitioners originated this action by filing their joint Complaint in the Jefferson Circuit Court. In their Complaint, Petitioners asserted their claim to these "contributions" and demanded return of the same. Again relying on § 137.13 (*supra*,

p. 16), Respondents denied Petitioners' right to a refund. Petitioners moved for summary judgment, which was granted over Respondent's objections. The trial court agreed that no issue of material fact existed in the case and accepted Petitioners' arguments based on *Policeman's and Fireman's Fund of the City of Newport* v. *Shields,* 521 S. W. 2d 82 (1975), and the Due Process Clause of the Fourteenth Amendment to the constitution of the United States.

The Fund unsuccessfully moved to vacate the judgment, and appealed to the Supreme Court of Kentucky.

After argument in briefs, the Supreme Court of Kentucky in a per curiam opinion, (—— S. W. 2d —— (1978)), reversed the trial court citing *Louisville Policemen's Retirement Fund* v. *Bryant,* Ky., 556 S. W. 2d 6 (1977), an incredibly similar and also erroneous decision, as dispositive.

In the firm belief that their constitutional rights have been abridged, Petitioners entered this Petition for a Writ of Certiorari.

ARGUMENT

Petitioners are, most simply, being deprived of earned funds by an extension of the City of Louisville; such deprivation being authorized by the Commonwealth of Kentucky in a discriminatory manner.

I.

The historical tradition that pensions are mere gratuities or bounties, with few or no rights vesting in the potential recipients, *In Re Hoag,* E.D. Penn., 227

F. 478 (1915), *Dodge* v. *Board of Education,* 302 U. S. 75 (1937), is based on the pensioner's lack of true pecuniary interest in the paying fund. *Pennie* v. *Reis,* 132 U. S. 464 (1889), stated that mandatory pension fund contributions (deducted by San Francisco from police officer's salaries) were in fact appropriations from the state, not part of the worker's salary and not owned as a matter of right. This hypothesis has continued to its contemporary counterpart, *Flemming* v. *Nestor,* 363 U. S. 603 (1959), where the Court held that even though the petitioner had made required contributions to the Social Security Fund, his interests were not protected by the Due Process clause, U. S. Const. amend. V. In *Nestor*, social security benefits were administratively terminated after the recipient was deported for past membership in a Communist organization. Justices Black, Brennan, Douglas, and Warren all dissented in *Nestor*, finding that the defeasance of interest thus effected was a taking without trial. Justices Black and Douglas were convinced that the statute under which Mr. Nestor's social security payments were terminated (§ 202(n) of the Social Security Act (68 Stat. 1083, as amended, 42 U.S.C. § 402(n)) actually constituted a Bill of Attainder.

Petitioners in the instant case are not claiming a vested interest in benefits from the Fund, but rather are seeking merely to have personal funds returned to them. Chapter 137.13 of the Codified General Ordinance of the City of Louisville (as amended), *supra*, upon which Respondents base their refusal to return Petitioners' monies, is clearly repugnant to the Fourteenth Amend-

ment of the United States Constitution, in that it demands a taking without trial and in light of Kentucky Revised Statutes 95.866 and 95.290 operates as a denial of equal protection under the law.

The heart of the Due Process issue is ownership of the assets in question. Both parties contend that they are the owner. Respondent can only rely on the ordinance herein challenged and the dubious logic of the *Pennie* type cases. Petitioners state first that they earned these sums and are due them as compensation for past services. Amounts from Petitioners' Fire Department salaries were calculated as a percentage of earnings, and actually diminished Petitioners' take-home remuneration. Further, both the Internal Revenue Service and Petitioners have demonstrated Petitioners' ownership of the funds in that the IRS demands, and Petitioners faithfully paid, personal income tax on the withheld money. *Cohen* v. *Commissioner,* 9th Cir., 543 F. 2d 725 (1976), a per curiam affirmation of the tax court, requires that mandatory contributions to a pension fund (defined in I.R.C. § 411(c)(2)(c) to include those, as in this case, upon which employment in conditional) are not deductible from taxable income as an employer contribution. The obliged contributor is also required to pay Kentucky Income tax on these funds. Petitioners' then, are required to pay seven percent of their income to the Fund, and to pay income tax on this fractional share. To maintain that monies placed in the Funds, the City of Louisville are a mere gratuity or an appropriation to the Fund and not the personal property of Petitioners and yet to tax Petitioners for the same as income is inconsistent. Contributions of this type are contributions of employee property. *Hogan* v. *United States,* 6th Cir., 513 F. 2d 170 (1975); *Mesisow* v. *Commissioner,* 3rd Cir., 218 F. 2d 687 (1955); *Miller* v. *Commissioner,* 4th Cir., 144 F. 2d 287 (1944).

Speaking for the Kentucky Supreme Court in *Louisville Policemen's Retirement Fund* v. *Bryant,* Ky., 556 S. W. 2d 6 (1977), a case which is virtually identical to that herein presented, including relevant statutes and upon which the instant case was summarily disposed, Justice Lukowsky stated that no federal due process argument would lie on the present facts, citing *Muzquiz* v. *City of San Antonio,* W.D. Tex., 378 F. Supp. 949 (1974). *Muzquiz* also dealt with mandatory pension fund contributions; the District Judge reluctantly held solely as a matter of stare decisis that a refusal to refund these contributions was not volitive of the Due Process Clause of the United States Constitution, even though the Due Process claim was quite strong and,

> "If this were a case of first impression, this Court might possibly have arrived at a different result." (at p. 955)

The Fifth Circuit, *Muzquiz,* 520 F. 2d 993 (1975) at first held there was no taking on an insurance theory that possible benefits exceeded member contributions; the Court did not state why it would infer an insuring-type arrangement without the normal insurance regulatory systems. On rehearing, 524 F. 2d 233 rehearing ordered; 528 F. 2d 499 (1975), the Fifth Circuit re-

duced the case to a jurisdictional question and dismissed as the defendant/respondent was held not subject to 42 U.S.C. 1983, under which *Muzquiz, supra,* was brought.

Chief Judge Jones, in a concurring opinion in *Steinberg* v. *United States,* 163 F. Supp. 596 (1958) set forth the position that a pension per se is not a vested right.

> ". . . . but in the case of retirement, where contributions have been made to a retirement fund, ... there is a definite contractual relationship which becomes effective upon retirement." (at p. 593)

In a separate concurring opinion in *Steinberg, supra,* Judge Whitaker wrote that rights in pension funds are vested as "Compensation for services already rendered." (at p. 594.) *Pennie, supra,* was disallowed with the finding that upon resignation, death, or dismissal from employment, a vested right to retirement funds exist.

While current statutory law may allow the retention of Petitioner's funds, clearly this is not a widely accepted pattern for pension systems.

In his text, *Establishing and Administering Pension and Profit Sharing Plans and Trust Funds,* (1970 edition, 1970), author David C. Rothman states:

> "In most (Internal Revenue Service qualified) plans member contributions are fully vested at all times and are not subject to forfeiture for any reason." (§ 14.104)

The President's Committee on corporate Pension Funds and Other Private Retirement and Welfare Programs in a report to the President ("Public Policy and Private Pension Programs, A Report to the President on Private Employee Retirement Plans," January, 1965) felt that a discussion of "vesting" need not include mandatory member contributions, since, generally, ". . . (The employee) is entitled to the return of his contributions upon withdrawal from the plan." (at p. 33, n. 1). The Federal Pension Reform Act for all its anticipated value in protecting mandatory contributions and the vesting of same after a one-year participation in a pension plan, exempted governmental plans including the pension plan attached herein. There have been no decisions as to whether or not this exemption applies to only taxable qualifying consequences and not the vesting requirements found in 29 U.S.C. 1051, et seq.

II.

Petitioners are being deprived of funds which they have earned, while others within the Commonwealth of Kentucky, similarly situated, are allowed the return of such funds upon severance of employment. Kentucky Revised Statute 95.290 (*supra,* p. 13) allows cities of the First Class to erect their own police and fire division pension funds; Kentucky Revised Statute 95.866 (Appendix, *supra,* p. 14) requires cities of the Second Class to refund mandatory policy and five pension fund contributions. [The Kentucky Constitution defines cities of the First Class as those with over 100,000 population and cities of the Second Class to be between 20,000 and

99,999 population (Constitution of Kentucky, § 156). Apparently, Kentucky law is silent on reimbursements from such funds in other Kentucky cities]. Louisville is the only First Class city in Kentucky. As stated above, § 137.13 of the Louisville ordinances prohibits the refund which K.R.S. 95.866 requires in smaller cities. Undoubtedly, the City of Louisville has acted in manner which is unfair, and when placed in the light of enabling statute (K.R.S. 95.290) this statute becomes discriminatory as applied to Petitioners. The Kentucky legislature directly and through a delegation to a subdivision has set up a system of classification, which in this case acts to deprive certain police and firemen of a portion of their income. This classification is of highly uncertain rationality. Petitioners concede the facts of this case do call only for the "rational relation" test under the Equal Protection Clause. *San Antonio Independent School District* v. *Rodriquez*, 411 U. S. 2 (1973). The Kentucky Supreme Court in *Kentucky Municipal League* v. *Commissioner, Department of Labor*, Ky., 530 S. W. 2d 198 (1975), has noted that no distinction as to salary rights should be made in cities of various sizes when the employee is working in an area of statewide concern and that fire protection is of statewide concern. In *City of Newport* v. *Shields*, Ky., 521 S. W. 2d 82 (1975) the Court enforced the requirements of K.R.S. 95.866. Further, the Kentucky Court has held that contributions of city employees to city pension funds are vested and not to be allowed by a change in governmental form. *Holsclaw* v. *Stephens*, Ky., 507 S. W. 2d 462 (1975).

In its brief to the Kentucky Supreme Court in *Bryant, infra*, arguing again the merits of §137.13, three rationales were given by the Louisville Policemen's Retirement Fund and apparently accepted by the Court. Actuarial convenience encouraging tenure and lower administrative costs were claimed to be promoted by this law. The first two of these assertions are ethereal. The size of the Fund as compared to the aggregate of Petitioners demand must be great indeed. No argument may exist that withholding over two thousand dollars is needed to cover the cost of administratively deleting a name from the fund. Further, if future operations of the fund may be determined from present data by actuarial inferences, surely the cost of extending these inferences to include those who withdraw from the Fire Department prior to ten years service clearly can not approach the amount of funds retained.

Arguably, the provision may encourage tenure. If it does so, this encouragement must varnish after ten years and a day, notwithstanding the fact that this encouragement remains as a confiscation of an earned salary.

CONCLUSION

Chapter 137.13 of the Codified General Ordinance of the City of Louisville (as amended) is repugnant to the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States and must be declared void in order to protect and sustain Petitioners' rights.

Respectfully submitted,

TEDDY B. GORDON AND
DAVID S. WEINSTEIN
Suite 204, Interchange Building
835 West Jefferson Street
Louisville, Kentucky 40202

Counsel for Petitioners

TEDDY B. GORDON
Suite 204, Interchange Building
835 West Jefferson Street
Louisville, Kentucky 40202

Counsel of Record

APPENDIX

APPENDIX A

KENTUCKY REVISED STATUTES

95.290 [2872b-1] Pension system for police and fire divisions; funds; administration expenses.

(1) The city legislative body in cities of the first class may enact ordinances providing for a system of pensions for retired and disabled members of the police and fire divisions of the department of public safety and their dependents, may appropriate funds for the purpose of paying such pensions, may allot and pay to the policemen's pension fund or the firemen's pension fund or either or both of them, all fines and forfeitures imposed upon members of the respective divisions, and may provide for, assets and collect contributions from the members for the benefit of the fund. (1966 c 255, § 101. Eff. 6-16-66. 1954 c 164, § 3; 1952 c 56, § 17.)

(2) Any pension fund established under the provisions of this section shall be held and distributed for the purpose of paying pensions and for no other purpose, except that the governing board of the fund may annually expend for the necessary expenses connected with the fund, including but not limited to expenses for medical, actuarial, accounting and legal services, the amount such governing board deems proper. (1966 c 255, § 101. Eff. 6-16-66. 1952 c 56, § 17.)

(3) Any ordinance establishing a pension fund under this section shall make equitable provision for the rights of persons having an interest in assets transferred to the fund from any fund heretofore established by statute. (1966 c 255, § 101. Eff. 6-16-66.)

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95.866 Withdrawal from service prior to retirement; refund; forfeitures.

(1) Upon withdrawal from service prior to retirement, a member shall be entitled to receive a refund of the amount of contributions made by the member after the date of establishment, without interest. (1956 c 16, § 16. Eff. 7-1-56.)

(2) Any member receiving a refund of contributions shall thereby ipso facto forfeit, waive, and relinquish all accrued rights and benefits in the system, including all credited and creditable service. The Board may, in its discretion, regardless of cause, withhold payment of a refund for a period not to exceed six months after receipt of an application from a member. (1956 c 16, § 16. Eff. 7-1-56.)

(3) Any member who has received a refund shall be considered a new member upon subsequent reemployment if such person qualifies for membership under the provisions hereof. After the completion of at least five years of continuous membership service following his latest reemployment, such member shall have the right to make a repayment to the system of the amount or amounts previously received as refund, including six percent interest from the dates of refund to the date of repayment. Upon the restoration of such refunds, as herein provided, such member shall have reinstated to his account all credited service represented by the refunds of which repayment has been made. Repayment of refunds by any member shall include all refunds received by a member prior to the date of his last withdrawal from service and shall be made in a single sum. (1956 c 16, § 16. Eff. 7-1-56.)

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APPENDIX B

PERTINENT PROVISIONS OF LOUISVILLE FIREFIGHTERS PENSION FUND

Chapter 137 of the Codified General Ordinance of the City of Louisville (as amended)

Chapter 137.02(d)

(d) The Board shall manage and control the Pension Fund and all related matters and shall use and disburse the funds in accordance with this ordinance and the Act of the General Assembly authorizing this ordinance.

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Chapter 137.03

137.03 *Pension Fund, Sources.*

The Pension Fund shall consist of:

(a) All gifts, devises and bequests of money or property or interest therein to the Board of Trustees of the Fund for the use and purpose for which the Fund is created. Any gift, devise or bequest to the Board of Trustees, for the Fund, may be absolute or upon the condition that only the rents, income or profits shall go to the Fund.

(b) All fines from disciplinary action against any member of the Department.

(c) All fines from violations of ordinances relative to fire prevention and protective regulations.

(d) All moneys, rewards or emoluments paid or given to the Department or any of the fire companies.

(e) All revenues received from exhibitions, field days and other similar events promoted under the auspices of the Department.

(f) Assessments upon each member of the Department of seven percent (7%) of the aggregate amount of all his

employee pay to be deducted from the salary, paid to the Director of Finance and paid by him into the Pension Fund. The Comptroller and Inspector shall furnish the Secretary of the Board with a copy of the monthly statements of the deductions hereunder.

(g) The proceeds of any taxes which may be levied, or other revenues which may be collected, by the city, and appropriated to the Pension Fund by the Board of Aldermen of the City.

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Chapter 137.13

Section 137.13 *Resignation or Dismissal.*

If a member who has completed less than ten (10) years of service resigns or is dismissed from the Department, he shall be entitled to no benefits hereunder. If a member who has completed ten (10) years but less than twenty (20) years of service resigns or is dismissed, the Board of Trustees shall refund to him, without interest, the amount which he has contributed to the Fund pursuant to Section 137.03(f) hereof and Section 95.320(6) Kentucky Revised Statutes, and any member shall automatically forfeit all other claims against the Fund. Provided, however, any member who has received payments from the Fund for disability pursuant to Section 137.09 hereof, or prior ordinances or statutes, in a total amount in excess of the amount which he has contributed to the Fund pursuant to Section 137.03(f) hereof, prior ordinances or Section 95.320(b) of the Kentucky Revised Statutes shall not be entitled to any refund.

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APPENDIX C

JEFFERSON CIRCUIT COURT

COMMON PLEAS BRANCH, SIXTH DIVISION

No. 206785

MICHAEL RICHARD O'CONNOR,
ALLEN PEAVLER, and
RICHARD M. SHUTTS - - - - - - *Plaintiffs*

v.

CITY OF LOUISVILLE FIRE FIGHTERS PENSION
FUND - - - - - - - - - - *Defendant*

MOTION FOR SUMMARY JUDGMENT

• • • • • • • •

ORDER AND SUMMARY JUDGMENT—Entered December 9, 1975

Motion having been made by the plaintiffs, Michael Richard O'Connor, Allen Peavler, and Richard M. Shutts, for a Summary Judgment pursuant to Rule 56 of the Kentucky Rules of Civil Procedure, and the Court having heard arguments of counsel, it appearing to the Court, upon consideration of the pleadings filed herein, that there is no genuine issue as to any material fact, and the plaintiffs are entitled to have judgment entered in their favor, as a matter of law, and the Court being otherwise sufficiently advised:

IT IS HEREBY ORDERED AND ADJUDGED AND DECREED, that the plaintiffs recover from the defendant, City of Louisville Fire Fighters Pension Fund, for the sum of Six Thousand

Four Hundred Sixty One Dollars and Ninty Cents ($6,461.90), their costs herein expended at the rate of 6 per cent per annum until satisfied, all for which the plaintiffs may have execution herein.

This being a final Order and there being no just reason for delay.

(s) J. Paul Keith, Judge

JEFFERSON CIRCUIT COURT

DIVISION TWELVE

No. 206785

MICHAEL RICHARD O'CONNER,
ALLEN PEAVLER, and
RICHARD M. SHUTTS - - - - - - *Plaintiffs*

v.

CITY OF LOUISVILLE FIRE FIGHTERS PENSION
FUND - - - - - - - - - *Defendant*

CORRECTED JUDGMENT PURSUANT TO MANDATE OF THE SUPREME COURT OF KENTUCKY—Entered March 17, 1978

On motion of the City of Louisville Fire Fighters Pension Fund, and the Court having been advised that the appeal in the Supreme Court of Kentucky has been fully decided, with the Opinion in said action having been rendered on January 31, 1978, the Mandate thereafter having been issued on February 28, 1978, the Court having been advised that said Mandate requires that the Judgment of this Court be reversed and this action dismissed, and the Court being otherwise duly advised;

IT IS HEREBY ORDERED that this action is dismissed, with prejudice, and the Defendant is awarded its costs herein expended.

(s) Witten, Judge

APPENDIX D

SUPREME COURT OF KENTUCKY

RENDERED: JANUARY 31, 1978

No. 76-535

CITY OF LOUISVILLE FIRE FIGHTERS PENSION FUND - - - - - - - - - *Appellant*

v.

MICHAEL RICHARD O'CONNER, ET AL. - - *Appellees*

Appeal from Jefferson Circuit Court
Common Pleas Branch—Sixth Division
Honorable J. Paul Keith, Judge
Action No. CR 206785

MEMORANDUM OPINION PER CURIAM REVERSING

Appellees are former firemen of the City of Louisville who voluntarily resigned their positions prior to ten years of service. They brought this action seeking a refund of compulsory contributions made to the Louisville Fire Fighters Pension Fund during their employment. We reverse the summary judgment entered in their favor by the trial court.

Our opinion in Louisville Policemen's Retirement Fund v. Bryant, Ky., 556 S. W. 2d 6 (1977), is dispositive of this appeal. In that case we held that KRS 95.290, which

governs the establishment of police and firemen's pension funds in cities of the first class, leaves to the city's legislative body the questions of vesting of rights and refunding of contributions.

The judgment is reversed and remanded with directions to the Jefferson Circuit Court to dismiss appellees' complaint.

All concur.

Counsel for Appellant:

LAWRENCE L. JONES, III
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
2800 Citizens Plaza
Louisville, Kentucky 40202

Counsel for Appellees:

TEDDY B. GORDON
BARTLEY AND GORDON
1521 Kentucky Home Life Bldg.
Louisville, Kentucky 40202